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In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL., PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

DONALD B. AYER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

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In our opening brief, we argued that the Commission correctly construed NGPA Section 101(b)(5), 15 U.S.C. 3311(b)(5), to provide that, when gas is qualified under more than one NGPA pricing provision, the applicable provision is the one that establishes the highest ceiling price—so that, in particular, if one provision declares that there is no legal ceiling, that provision applies and the gas is price-deregulated. We showed that this construction is required by the language of Section 101(b)(5) and by the NGPA's general approach to price regulation, both of

which focus on legal ceilings and not on particular producers' contract prices, and is the only construction consistent with the overall congressional plan of phased-in deregulation and with the terms of the debate that led to enactment of the NGPA. We also showed that the court of appeals' and the producer respondents' contrary construction, which grants each producer of dual-qualified gas the right to avail itself at any particular time of whichever provision results in the highest price under its particular contracts, is incompatible with the statutory text, structure, and history. Nothing in the producer respondents' brief, which ignores large parts of our analysis, casts any doubt on the correctness of the Commission's conclusion, and only a few of respondents' arguments warrant a reply.[1]

1. Respondents attempt a plain-language argument (Br. 21-26), but instead of carefully examining the words of Section 101(b)(5), they offer only general rules of statutory construction and repetition of the statutory text. The section states that, when a quantity of gas qualifies under more than one provision, "the provision which could result in the highest price shall be applicable." Respondents make no plausible effort to account for the fact that Section 101(b)(5) selects the provision that "could result" in the highest price, an expression that on its face refers to a legal ceiling, not the provision that "results" or "actually results" or "will result" in the highest price under a particular contract at a particular time. Respondents ignore the fact (see Gov't Br. 23-24) that nothing in the language makes any reference to particular producers or their contracts or suggests that two producers whose gas

[1] We hereafter refer simply to "respondents" in speaking of the producer respondents, Martin Exploration Management Co., et al.

falls within the same overlap of pricing provisions could receive different treatment for that gas depending on what prices each agreed to in its contracts. And respondents make no attempt to show how a reading of Section 101(b)(5) under which the applicable ceiling is determined by first examining particular contract prices would accord with the overall approach taken by the NGPA's wellhead pricing provisions, which focus on ceiling prices only and otherwise leave contract prices wholly to private decision (see Gov't Br. 25-27).

Respondents make, at bottom, only two arguments on the statutory language. First, they appear to suggest (Br. 23) that the reason Congress used "could result" rather than "results" or "actually results" or "will result" is that, since NGPA provisions do not *dictate* prices, it would be improper usage to employ one of those alternative locutions. But respondents' own brief in opposition, at the petition stage in this case, repeatedly used those very locutions (Br. in Opp. 8, 11, 14, 16) when *they* wanted to convey the idea of comparing provisions to see which leads to the highest price at a particular time under particular contracts. Congress could have done the same thing, but it chose the words "could result" because it wanted a comparison of NGPA provisions, not of the prices called for by particular contracts.

Respondents also argue that Congress would not have chosen the language it did "if it wished to reach the same result – price-deregulation – in every case" (Br. 23). But respondents mysteriously ignore the fact that Section 101(b)(5) also governs the choice between two or more *regulated* categories in which a particular quantity of gas qualifies. See Gov't Br. 23-25. The language Congress used in Section 101(b)(5) is an economical and altogether natural way to cover all category comparisons in a single

sentence; indeed, it is not easy to think of a more compact (or clearer) way to accomplish the task.[2]

2. a. Respondents' analysis of congressional intent (Br. 26-33) makes no attempt to respond to our showing (Gov't Br. 28-31) that their proposed construction of Section 101(b)(5), which would allow a producer to opt back into regulation whenever it could obtain a regulated price higher than the price it would obtain if the gas were deregulated, is incompatible with the compromise plan for the future of natural gas pricing that Congress put into effect in the NGPA. As the statute's structure and legislative history make clear, the NGPA creates a scheme of "phased deregulation," and there is no indication that Congress contemplated a return of deregulated gas to regulated status except through the carefully limited mechanism of Section 122, 15 U.S.C. 3332 (now-expired authority for one-time, temporary presidential or congressional reimposition of price controls). Respondents do not merely ignore that plan in construing Section 101(b)(5). They suggest (Resp. Br. 6-9, 20-21 & n.11) that the NGPA's provisions may be neatly divided into those which are pro-producer and those which are pro-consumer, and that

[2] Respondents suggest (Br. 22 n.12) a rewriting of Section 101(b)(5) that they believe reflects the Commission's reading of the provision, but that rewriting betrays respondents' misunderstanding both of Section 101(b)(5) and of the Commission's reading. Under respondents' rewriting, regulated-regulated gas would " 'be treated under the provision which sets the highest price' " (Resp. Br. 22 n.12). But the pricing provisions of the NGPA do not "set[]" prices; they establish only upper limits, if any, on the prices that producers and their customers may set by contract. Accordingly, a "competent draftsman" (*id.* at 23) who wished, as we think Congress did, to provide for a comparison of "maximum lawful prices" would not make applicable " 'the provision which sets the highest price' " (*id.* at 22 n.12). Such a draftsman, we think, would make applicable the provision that "could result in the highest price."

Section 101(b)(5) must be read as clearly in the former group, thus allowing its construction in isolation from the structure and aims of the NGPA as a whole.

Respondents also offer no answer at all to our argument (Gov't Br. 31-35) that their construction of Section 101(b)(5) would treat producers in a manner wholly outside the terms of the debate that led to the NGPA's enactment and far more favorably than anyone in Congress contemplated. The NGPA reflects the "Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983)), one favoring rapid deregulation, the other the extension of regulatory controls into intrastate markets. It would be inconsistent with both of those responses to give producers a legal tool for securing higher prices for gas eligible for deregulation than they could obtain in the unregulated market. As Senator Jackson, the Senate floor manager, made clear (124 Cong. Rec. 28633 (1978)), deregulation was the "maximum economic incentive" that anyone in Congress contemplated.[3]

b. Ignoring the import of the statutory structure and of the legislative history taken as a whole, respondents focus (Br. 26-28) on two particular statements in the leg-

[3] Contrary to respondents' misinterpretation (Br. 30-33), we do not suggest that there is some single "market price" applicable to all producers, above which the NGPA forbids producers to sell. A "market price," of course, is the price a particular producer can obtain in the market from a particular purchaser at a particular moment, and there could conceivably be as many market prices as there are producer-purchaser transactions. The point is that Congress did not intend to give producers a mechanism for obtaining a higher price than they could obtain in the market, once the dates set by the NGPA for deregulation arrived.

islative history. As we explained in our opening brief (at 36-38), however, even aside from the existence of statements in the legislative history that point in the opposite direction (see Pet. App. 21a n.15), the statements respondents rely on cannot possibly overcome the arguments supporting the Commission's construction of Section 101(b)(5).

The first statement—by key House conferees led by Representative Dingell (124 Cong. Rec. 38363-38364 (1978)), who was in what respondents would term the "pro-consumer" group of legislators (Resp. Br. 21 n.11)—was indeed offered in explanation of Section 101(b)(5). But, as we have explained (Gov't Br. 37-38), the statement was addressed to a different problem from that presented in these cases: the process by which producers qualify gas in particular categories, not (as here) the selection among multiple categories in which gas has already been qualified. The statement simply assured other legislators that the process of obtaining category-qualifications from state and federal jurisdictional agencies under Section 503, 15 U.S.C. 3413, which relies at least in general on producer initiative, would not be displaced by Section 101(b)(5)—that is, that Section 101(b)(5) did not mean that the jurisdictional agencies would have the substantial burden of determining sua sponte all of the provisions under which particular gas might be qualified.

The second statement relied on by respondents, which appears in the Conference Report (H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 83 (1978)), was not made as an explanation of Section 101(b)(5) at all, so it could be of little weight in determining the proper construction of that provision. As we explained in our opening brief (at 38 n.32), the statement is an explanation of the singular and

complex pricing requirements of Sections 105(b)(3) and 121(e), 15 U.S.C. 3315(b)(3), 3331(e), covering certain gas sold under existing (or successor) intrastate contracts subject to "indefinite price escalator clauses."[4] Properly understood, the conference committee statement does not offer respondents any support.

Gas sold under existing (or successor or rollover) intrastate contracts at a price in excess of $1 (per million British thermal units) is generally deregulated by Section 121(a)(3), 15 U.S.C. 3331(a)(3), effective January 1, 1985. Section 121(e), however, calls off that price deregulation for a subcategory of such gas: if the price is established by an indefinite price escalator clause, and if the gas would not in any event be deregulated under a subsection of Section 121 other than subsection (a)(3), then Section 105(b)(3) applies. Subsection (A) of that provision, in turn, places a ceiling on price escalation for such gas, and subsection (D) then states that that ceiling does not apply to gas (as Section 121(e) already makes clear) that falls into other categories deregulated by Section 121 (gas under Sections 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)) or to gas that falls into the still-regulated categories of high-cost and stripper-well gas defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318,

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[4] An indefinite price escalator clause is defined in Section 105(b)(3)(B), 15 U.S.C. 3315(b)(3)(B), as any provision of any contract—

> (i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or
>
> (ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

and that is therefore subject to other (in fact, higher) ceilings. In short, a portion of the intrastate gas that would be deregulated by Section 121(a)(3) is brought back under regulation to limit the effect of indefinite price escalator clauses.

The Conference Report (H.R. Conf. Rep. 95-1752, *supra*, at 83) explains the workings of those complex pricing provisions, stating:

> [N]atural gas which is deregulated as a result of being new gas under sec. 121(a)(1), gas from deregulated new, onshore production wells under sec. 121(a)(2) or 121(c), or high cost natural gas under sec. 121(b), would not be subject to this limitation [Section 105(b)(3)], even if it were sold under an existing intrastate contract. Furthermore, natural gas qualifying as gas produced from a natural gas stripper well would not be so limited, if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.

Respondents seize on the last sentence of that explanation, concerning Section 108 gas, and, without reference to the context or the underlying statutory provisions it explains, claim that Congress here stated that dual-qualified regulated-deregulated gas could take regulated treatment at the producer's option (Resp. Br. 27-28). But even aside from whether Congress's understanding of Section 101(b)(5) can be inferred from this single statement, which is buried in a long explanation of complex, interrelated provisions other than Section 101(b)(5) itself, the statement does not indicate what respondents suggest.

First, the statement is not in fact addressed to gas that falls into two categories, one with a price cap, the other not. The statement concerns the overlap of gas covered by

Section 108 and gas covered by Section 105(b)(3)(A)—both of which are subject to statutory ceilings. The conference committee admittedly referred to gas taking "deregulated treatment," but that usage cannot change the fact that the statement applies only to gas that falls under two provisions that impose price ceilings. Even respondents recognize the peculiarity of the committee's usage: they properly use quotation marks in their own reference to "the 'deregulation' of the overlapping intrastate category" (Br. 28). The committee's usage, which the Commission (Pet. App. 117a) and the court of appeals (*id.* at 25a) followed, is due to the complex structure of Section 121, under which the intrastate gas at issue is "deregulated" by Section 121(a)(3), only to be brought back under a price control in certain circumstances by Sections 121(e) and 105(b)(3).

Second, although the particular sentence relied on by respondents does not address gas qualified for both a category subject to price caps and a category that is not, the provisions that are explained in the cited portions of the Conference Report do. And what those provisions say confirms the Commission's view that regulated-deregulated gas should be treated as deregulated. In each case of the overlap of a category of gas subject to a price ceiling (*i.e.*, the Section 105(b)(3)(A) price ceiling) with a category in which all price ceilings are removed, Sections 105(b)(3)(D) and 121(e) specifically provide that the latter category governs.

3. On the second question presented in these cases, respondents argue (Br. 38-42) that the Commission has overstepped its authority and interfered with the process of qualifying gas in particular categories. But the Commission has not issued any determinations of the qualification of particular gas or provided for the bypassing of the Section 503 procedures. Compare *Williston Basin Inter-*

state Pipeline Co. v. *FERC,* 816 F.2d 777, 781-782 (D.C. Cir. 1987), cert. denied, No. 87-502 (Jan. 19, 1988). Rather, as we explained in our opening brief (at 40-43), the Commission has merely insisted by rule that jurisdictional agencies implement the concededly valid definition of a certain category of "new tight formation" gas under Section 107(c)(5) that it is unquestionably within the Commission's power to define: since such gas "is" Section 102 or 103 gas, by definition, it must be given that label when it is given the Section 107(c)(5) label.[5]

This was an entirely reasonable exercise of the Commission's regulatory powers under Sections 501 and 503(a)(2), 15 U.S.C. 3411, 3413(a)(2), and of the special power to develop the Section 107(c)(5) pricing scheme, which Congress expressly committed "to the expertise and judgment of FERC" (*Pennzoil Co.* v. *FERC,* 671 F.2d 119, 123 (5th Cir. 1982)). Indeed, in providing for deregulated treatment under Section 102 or 103 of certain new tight formation gas, the Commission has furthered Congress's intent to reserve Section 107(c)(5) incentive pricing for those situations where it is "needed in order to make high-cost

[5] Indeed, in order to be new natural gas ("as defined in section 102(c)"), and hence come within the definition of new tight formation gas under Section 107(c)(5) (see 18 C.F.R. 271.703(b)), the gas must, by virtue of Section 102(c) itself, be "determined in accordance with section 503" to meet Section 102(c)'s requirements. For such gas, the statute thus expressly states what the Commission here reaffirmed by rule: a new tight formation determination cannot be issued without issuance of the implicit Section 102(c) determination. Section 103 contains the same "determined in accordance with section 503" language, but it does not appear in the definitional subsection (c) referred to in the Commission's regulation defining new tight formation gas. So trivial a difference, however, cannot render the Commission's Section 107(c)(5) ruling valid for Section 102 gas and not valid for Section 103 gas.

gas worth exploiting" (*Williston Basin Interstate Pipeline Co.,* 816 F.2d at 779). In any event, the court of appeals on rehearing (Pet. App. 30a) recognized "FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)." What the Commission has done is no different from such a modification (Gov't Br. 42).

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. AYER*
Acting Solicitor General

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission

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* The Solicitor General is disqualified in these cases.

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